Supreme Court, U.S.
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No. 99-1564

In The

Supreme Court of the United States

MICHAEL MAHONEY, Warden,
Montana State Prison,

Petitioner,

v.

WILLIAM JAY GOLLEHON,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONER'S REPLY BRIEF

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INTRODUCTION

Respondent's brief in opposition makes various substantive claims, none of which has merit: The Petition should be denied because this Court has no jurisdiction under 28 U.S.C. § 1254(1) with respect to the first question presented; any decision in *Slack v. McDaniel*, No. 98-6322, is irrelevant to resolve the first question presented because *Slack* is a non-capital case; the Ninth Circuit had the authority to enter the judgment below regardless of whether an appeal was authorized under 28 U.S.C. § 2253(c); and in any event, the Court of Appeals not only correctly ruled that the appeal was moot after the Montana Supreme Court resolved the claims pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), in September 1999, but also fashioned an appropriate remedy. Respondent additionally makes two errors in his factual recitation that warrant response.

REPLY ARGUMENT

1. Respondent asserts in his statement of the case that the "question of whether the *Brady* claims were actually exhausted or not was certainly an issue before the Ninth Circuit." (Br. Opp'n 8.) That assertion is incorrect. He acquiesced in the District Court's determination that the *Brady* claims were unexhausted when he asked the court to hold his petition in abeyance while he exhausted the claims in state court (which was granted), and in his subsequent request to delete the unexhausted claims and hold the fully exhausted habeas petition in abeyance (which was denied). Further, in his brief to the Ninth

Circuit, Respondent specified the sole issue on appeal as follows: "Whether the district court erred in dismissing Respondent's pre-Antiterrorism and Effective Death penalty habeas corpus petition instead of employing the abeyance procedure discussed in *Calderon v. United States District Court for Northern Dist. of California ("Thomas")*, 144 F.3d 618 (9th Cir. 1998)." (App. 94a.) Whether the District Court had erred in determining that the *Brady* claims were unexhausted was not an issue before the Ninth Circuit.

Respondent also inaccurately implies that had the district court given him the opportunity, he would have withdrawn his unexhausted *Brady* claims without being granted the assurance of a stay pending resolution of his ongoing state court postconviction relief proceeding. (Br. Opp'n 9-10.) In the trial court proceedings, though, he conditioned the deletion of his unexhausted claims on the assurance that the habeas petition would be held in abeyance in the district court. (App. 100a-101a.) As discussed above, moreover, his sole complaint to the Ninth Circuit was that the District Court improperly denied him the "withdrawal and abeyance" procedure. Finally, Respondent has admitted in his cross-petition that "[i]n opposing [Petitioner's] renewed request for dismissal cross-petitioner asked the district court for leave to amend out his unexhausted claims *so that his fully exhausted petition could be held in abeyance* while he continued pursuing his unexhausted *Brady* claims in state court." (Cross-Pet. 4; emphasis added.)

2. Respondent challenges this Court's jurisdiction with respect to the first question presented – which asks whether the certificate of appealability requirements

added to 28 U.S.C. § 2253(c) by the Antiterrorism and Effective Death Penalty Act ("AEDPA") applied to his appeal and, if so, whether this matter should be remanded for application of those requirements – because the order of the Ninth Circuit's motions panel issuing a certificate of probable cause was filed March 1, 1999. (App. 2a.) He contends that the decision in *Hohn v. United States*, 524 U.S. 236 (1998), established both a right and an obligation to seek immediate review of the motions panel's determination. Respondent is incorrect.

First, the determination of a Ninth Circuit motions panel to grant a certificate of probable cause, ~~or~~, under the amended § 2253(c), a certificate of appealability, is not binding on the merits panel. *Hiivala v. Wood*, 195 F.3d 1098, 1104 (9th Cir. 1999) ("the Advisory Committee Note to Rule 22-1 makes clear that this court's motions panel's rulings on jurisdictional issues do not bind a merits panel of the same court"); *see also United States v. Robertson*, 52 F.3d 789, 791 (9th Cir. 1995) ("[a] merits panel of this court may review the motions panel's decision" denying a motion to dismiss appeal). The motions panel's order here was thus nonfinal or interlocutory in nature and subject to review by the merits panel either at a party's request or by virtue of the jurisdictional nature of the issue, sua sponte. *See, e.g., Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 95 (1998); *McQueary v. Blodgett*, 924 F.2d 829, 833 n.5 (9th Cir. 1991). Moreover, and without reference to the binding quality of the motions panel's determination, the January 3, 2000 order was conditioned jurisdictionally upon the issuance of an appropriate certificate, and to the extent § 2253(c) was not satisfied, cannot stand. *Cf. Reece v. Georgia*, 350 U.S. 85, 87 (1955)

("[w]e have jurisdiction to consider all of the substantial federal questions determined in the earlier stages of the litigation, . . . and our right to re-examine such questions is not affected by a ruling that the first decision of the state court became the law of the case") (citation omitted). Respondent, of course, concedes that the validity of the January order is properly before the Court. (Br. Opp'n 1-2.)

Second, nothing in *Hohn* remotely supports the reading proposed by Respondent. There, this Court was concerned with whether an application for a certificate of appealability was a "case" for § 1254(1) purposes when the certificate was *denied*. The majority opinion answered that question affirmatively, rejecting the contention "that a request to proceed before a court of appeals should be regarded as a threshold inquiry separate from the merits which, if denied, prevents the case from ever being in the court of appeals." 524 U.S. at 246. Tellingly, the Court observed that it has "long treated appeals of dismissals for improper venue as cases in the courts of appeals" and distinguished orders *granting* a change of venue, where it has declined to exercise appellate jurisdiction, because "[t]he jurisdictional problem in those cases . . . was the interlocutory nature of the appeal, not the absence of a proper case." *Id.* at 248-49. The same distinction controls presently.

3. In his opposition brief and the cross-petition, Respondent advances an alternative basis for the determination by the Ninth Circuit motions panel that his appeal was not precluded by AEDPA's certificate of appealability requirements in 28 U.S.C. § 2253(c). He argues that because a capital defendant in an opt-in state

allegedly does not have to comply with the certificate of appealability standards, requiring a capital defendant in a non-opt-in state, such as Montana, to comply with those standards, denies equal protection and due process. However, Respondent asks that this issue be addressed only if review as to the first question presented is granted. (Cross-Pet. 14.)

Respondent's argument in this regard says nothing germane about the propriety of granting certiorari. Petitioner has requested that, should this Court determine in *Slack v. McDaniel* that AEDPA applies to any notice of appeal filed after its effective date, it should grant the petition, vacate the Ninth Circuit's judgment, and remand for reconsideration the question whether a certificate of appealability under 28 U.S.C. § 2253(c) should be issued.[1] If the Petition is granted as to the first question and the requested relief directed, Respondent's Fifth Amendment-based challenge to § 2253(c) should be directed to the Court of Appeals on remand. Moreover, even if this Court were to grant certiorari and determine the merits of whether a certificate should issue, Respondent could raise his constitutional claim.

4. Respondent effectively asserts that a court of appeals may decide the mootness issue even if it lacks jurisdiction under 28 U.S.C. § 2253(c). (Br. Opp'n 11-12.)

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[1] As the Petition's Statement of the Case discusses, Respondent's habeas corpus petition was filed before AEDPA's effective date, while, as would necessarily be the case, his appeal from the District Court's dismissal of the habeas petition was filed after such date. The words "prior to" in the second and third lines of page 4 of the Petition thus should read "after."

He again is incorrect. The threshold question in any habeas corpus appeal is whether appellate jurisdiction exists in the first instance under the standard contained in § 2253(c). *See Mansfield, C. & L.M. Ry. v. Swan*, 111 U.S. 379, 382 (1884) ("the first and fundamental question is that of jurisdiction" which "spring[s] from the nature and limits of the judicial power of the United States" and "is inflexible and without exception"). If no statutory appellate jurisdiction exists under that provision, the district court judgment must be left intact.

This otherwise self-evident conclusion also is dictated by common sense. The purpose of appellate mootness decisions like *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950), is to avoid prejudice from judgments that become unreviewable through a change in circumstances. There can be no prejudice of this sort from a district court habeas corpus decision where the court of appeals lacks any review authority over the decision.

5. Respondent argues, finally, that the Ninth Circuit's remedy was appropriate because it is the "ordinary practice" to vacate the judgment below when an appeal becomes moot. (Br. Opp'n 14.) He ignores the complementary component of the relief accorded when a matter becomes moot on appeal, i.e., that in addition to the judgment being vacated, the case must be dismissed. The absence of this complementary component is critical since, notwithstanding the issuance of the Montana Supreme Court's September 1999 decision denying state postconviction relief to Respondent, the parties' dispute over the propriety of the District Court's dismissing the

habeas petition continued. None of the authority Respondent relies upon for a different result is apposite.[2]

a. In *Lewis v. Continental Bank Corp.*, 494 U.S. 472 (1990), the respondent succeeded before the district court on its Commerce Clause challenge to a Florida statute which prohibited out-of-state banks from operating industrial savings banks ("ISB") in that State, but the challenge was mooted by amendments to the Bank Holding Company Act enacted while the matter was on appeal. The respondent nonetheless contended before this Court that it desired to establish an ISB that would be unaffected by the amendments. Because the amendments' adoption could not have been foreseen and because the respondent did not have a reasonable opportunity before the court of appeals to indicate that desire, this Court deemed it appropriate to deviate from the "ordinary practice" of vacating the judgment and remanding with instructions to dismiss the complaint. *Id.* at 482. The

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[2] Respondent also claims that, since the underlying dispute on appeal was exhaustion of the *Brady* claims, when the *Brady* claims were resolved by the Montana Supreme Court in September 1999 "there was no longer any reason to address the exhaustion issue, or the issues cognate to it" and the Ninth Circuit correctly ruled that the appeal was moot. (Br. Opp'n 13.) As discussed above, however, whether the *Brady* claims were exhausted was not the issue before the Ninth Circuit. The fact that the *Brady* claims were resolved by the Montana court during the pendency of the appeal consequently was not relevant to the issue on appeal. Respondent's argument that, once the *Brady* claims became exhausted the appeal was rendered moot, fails to recognize that, if the habeas petition has to be refiled, AEDPA would apply. Since a ruling on the merits will have an impact on the parties, the case is not moot.

Court therefore vacated the judgment but remanded for further proceedings to allow the respondent to amend its pleadings or develop the record more fully with respect to its "concrete interest" in seeking to operate an ISB unaffected by the amendments. *Id.* Similarly, in *Diffenderfer v. Central Baptist Church, Inc.*, 404 U.S. 412 (1972), cited in *Lewis*, the appeal was rendered moot by the repeal of the challenged statute and the enactment of new legislation. The district court's judgment was vacated and the case remanded to allow the appellants to amend their pleadings to challenge the new statute or to show that the repealed statute retained some force.

Lewis and *Diffenderfer* add nothing here. First, the Montana Supreme Court's decision in the postconviction relief proceeding did not moot the controversy between the parties, since they continued to have exactly the same stake in the appeal's outcome as they possessed prior to the state court's decision. Second, if Respondent's purpose in relying on those cases is to suggest that the Ninth Circuit's remedy was consistent with its determination that the Montana court's decision mooted the parties' controversy, he misses the mark. The Court of Appeals' order not only reinstates the existing habeas petition, but there is also no need for Respondent to make substantive amendments given the presence of the *Brady* claims in the petition. Thus, rather than simply affording Respondent the opportunity to amend his habeas petition in light of "a change in the legal framework governing the case" (*Lewis*, 494 U.S. at 482), the Ninth Circuit effectively awarded him the basic relief he had sought in the appeal – i.e., the right to proceed on his original habeas petition.

That is not the type of relief directed by this Court in *Lewis* and *Diffenderfer*.

b. *Sharpe v. Buchanan*, 317 U.S. 238 (1942) (per curiam), is equally unhelpful. There, the appeals court (121 F.2d 449 (1941)) affirmed the district court's denial of habeas corpus relief (*Ex parte Sharpe*, 36 F. Supp. 386 (W.D. Ky. 1941)) on the ground that Sharpe had not first utilized the judicial remedies afforded by the State. After a petition for writ of certiorari was filed, that obstacle was removed, and this Court vacated the judgment and remanded to the Court of Appeals for such further proceedings as it might deem appropriate. Jurisdiction was conferred under 28 U.S.C. §§ 452 and 453, which the district court stated was not unqualified and should be exercised only after recourse is made to whatever judicial remedy is afforded by the State. 36 F. Supp. at 387-88; *see also United States ex rel. Kennedy v. Tyler*, 269 U.S. 13, 17 (1925) ("[t]he due and orderly administration of justice in a state court is not to be thus interfered with save in rare cases where exceptional circumstances of peculiar urgency are shown to exist"). *Sharpe* was decided in light of the standards then in effect, which, as construed by this Court, permitted a properly dismissed habeas application to be considered on the merits if exhaustion occurred during the appellate process. Here, the district court had jurisdiction under 28 U.S.C. § 2254, which was not enacted until 1948. Section 2254 and this Court's decisions require dismissal of petitions containing unexhausted claims (*Rose v. Lundy*, 455 U.S. 509 (1982)), and the district court was simply following congressional mandate as construed by this Court. It also did not make a difference in *Sharpe* that the Court apparently permitted

the habeas petition to be entertained without reference to the exhaustion requirement. Since the enactment of AEDPA, however, dismissal, rather than reinstatement, will have a significant impact on the proceedings – precisely the reason the case is not moot.

CONCLUSION

For these reasons and the reasons articulated in the petition, if this Court determines in *Slack v. McDaniel*, No. 98-6322, that AEDPA applies to any notice of appeal filed after its effective date, it should grant the petition, vacate the Court of Appeals' judgment, and remand for reconsideration the question whether a certificate of appealability under 28 U.S.C. § 2253(c) should be issued.

Alternatively, the Court should grant the petition, summarily reverse the Court of Appeals' judgment, and affirm the District Court's judgment.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE DISTRICT OF MONTANA
HELENA DIVISION

WILLIAM GOLLEHON Petitioner, -vs- MICHAEL MAHONEY, Warden, Montana State Prison, Respondent.	Cause No. CV 95-37-H-CCL **RESPONSE TO MOTION TO DISMISS**

Respondent moves to dismiss petitioner's habeas corpus petition and if such dismissal is not ordered that petitioner be required to amend his petition so that it contains only exhausted claims. Petitioner, respectfully requests that the Court order the second alternative.

In *Caldleron v. U.S. District Court for Northern District of California,* 134 F.3d 981 (9th Cir. 1998) the Court noted:

> The district court discovered a relatively simple way around the . . . proscription against holding mixed petitions in abeyance pending exhaustion in state court. In fact, all told, the procedure the district court followed involved only three

> essential steps: first, it allowed [petitioner] to amend his mixed petition to delete the unexhausted claims; second, it stayed and held in abeyance the amended, fully exhausted petition pending [his] exhaustion of the previously unexhausted claims in . . . state court; and third, it suggested that it would allow [petitioner] to amend his petition for a second time after litigating his claims in state court in order to fold the newly exhausted claims back into his original habeas petition.
>
> *Calderon v. U.S. District Court for Northern District of California*, 134 F.3d at 986

We ask that this Court follow this procedure and allow petitioner to amend his petition to delete claims 11 and 12 (the unexhausted ones) and then hold his fully exhausted petition in abeyance. Meanwhile, petitioner will continue exhausting these claims in state court. Moreover, if he does not prevail on them there petitioner will then seek to reamend his petition and reinclude claims 11 and 12 in his habeas corpus petition.

CONCLUSION

WHEREFORE petitioner prays that the court will deny respondent's motion to dismiss and instead adopt respondent's second suggested alternative and allow him to amend his petition to delete the unexhausted claims.

Opposition Brief Unavailable for Filming at this Time